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Controlling National Security Wiretaps

IN SENATE HEARINGS on warrantless wiretapping the other day, Attorney General William B. Saxbe urged Congress not to "overreact" to the Watergate scandals by curbing the President's ability to protect the nation's security. Mr. Saxbe need have no fear. Far from overreacting, Congress seems disinclined to act at all to define the legitimate boundaries of national security wiretapping and to protect citizens against electronic surveillance which is both warrantless and unwarranted.

There is more than ample cause for congressional action. The House Judiciary Committee, in its impeachment inquiry, reviewed the Nixon administraton's warrantless wiretapping of 13 government officials and four newsmen in 1969-71 and concluded that the program constituted a serious abuse of presidential power. But the matter has not been pressed. The Senate Foreign Relations Committee's hearings on the 17 wiretaps left many questions unresolved. Legislation requiring judicial approval of all national security and foreign intelligence wiretaps has been introduced by several legislators, including Sens. Edward M. Kennedy (D-Mass.), Gaylord Nelson (D-Wis.), Sam J. Ervin (D-N.C.) and Charles McC. Mathias (R-Md.). Last week, however, when the hearings which those senators had sought were held, the sponsors of this legislation passed up the opportunity to join the issue with Mr. Saxbe and FBI Director Clarence M. Kelley.

So the hearings, which might have produced some incisive debate, instead were dominated by the old familiar arguments against congressional and judicial involvement in national security affairs. Mr. Saxbe and Sen. John L. McClellan (D-Ark.) argued, for instance, that legislation restricting national security wiretapping would be unconstitutional. In fact the Supreme Court has not addressed this question; a case that raises the issue may be heard in the coming term. Messrs. Saxbe and Kelley also claim that legislated standards would make intelligence surveillance almost impossible. It is true that the criteria for warrants would have to be carefuly drawn. But the Justice Department has yet to show specifically how new standards such as those proposed in the most recent bill would keep the government from getting essential intelligence on foreign and defense matters which could not be obtained by any other means.

Finally, the Attorney General repeated his contention that foreign policy and defense secrets are too sensitive to be confided to judges, who may lack the discretion and capacity to handle them. This is an insult to the federal judiciary, which now deals capably with the most delicate, complex affairs, and has a better record than other branches of government for keeping secrets where secrecy is needed. To promote judicial consistency and expertise, the authority to review national security surveillance could be vested in a single court, such as the U.S. Court of Appeals for the District of Columbia.

The purpose of judicial review of wiretapping and bugging, after all, is not to frustrate those official operations which can be justified, but to insure that real justification does exist. The lesson of the past is that personal assurances from a President and an Attorney General are not enough protection against abuse. As Associate Justice Lewis Powell wrote in the domestic security wiretapping case, "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." It would be irresponsible for Congress to ignore the record and fail to act.